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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of NINA and TIMOTHY
ARMOUR.

NINA RITTER,

Appellant,

v.

TIMOTHY ARMOUR,

Respondent.

B191032

(Los Angeles County
Super. Ct. No. BD390510)

APPEAL from a judgment of the Superior Court of Los Angeles County. John H. Sandoz, Judge. Reverse and remand.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke, L. Rachel Helyar and Gia Kim; Law Offices of Vickie Greene and Vickie J. Greene, for Appellant Nina Ritter

Barger & Wolen and Royal F. Oakes, for Intervenor-Appellant Radio and Television News Association of Southern California.

Greines, Martin, Stein & Richland, Robin Meadow and Edward L. Xanders; Jaffe and Clemens, and Bruce A. Clemens, for Respondent Timothy Ritter.

Latham & Watkins, Pamela S. Palmer, Ernest J. Hahn, Richard P. Bess and Jeffrey A. Pojanowski, for Intervener-Respondent Capital Group Companies, Inc.

Nina Ritter appeals from the trial court's order sealing from public scrutiny in her marital dissolution proceedings the trial exhibits and all of the testimony (amounting to the entire trial) related to her husband's employer, Capital Group Companies, Inc. We reverse and remand.

FACTS AND PROCEEDINGS

Appellant Nina Ritter and her husband, Tim Armour, married in 1984. During their marriage, Tim worked for Capital Group Companies, Inc. ("CGC"), a privately held money and asset management company. Tim is one of about 350 upper level managers who own virtually all of CGC's stock, and the lion's share of Tim and Nina's wealth is in that stock.

In 2003, Tim filed a petition for dissolution of his marriage with Nina. CGC thereafter notified Nina that it would exercise its contractual right under the company's Stock Restriction Agreement to redeem at a set formula price all shares of CGC stock that she might receive in her property settlement with Tim. In order to value the marital estate and the CGC stock, Nina subpoenaed documents from CGC involving ownership of its stock, its financial history and performance, and its compensation system. CGC produced the documents under a stipulated protective order signed by Nina, Tim, and CGC by which they bound themselves not to disclose the documents to anyone outside the dissolution proceedings.

For reasons not pertinent to this appeal, Tim and Nina agreed to bifurcate the trial of their marital dissolution. The trial's first phase focused largely on valuing and dividing their marital property.¹ On the eve of trial, CGC applied to the court for an order removing from the court record and sealing from public view all of CGC's "confidential material" to be used at trial, which CGC defined as "confidential, proprietary, and trade secret information." According to CGC, that information fell into

¹ Nina has appealed from the court's division of marital property following the first phase.

three categories involving “compensation,” “stock ownership,” and “financial performance.” CGC defines each category as follows:

- “Compensation” involves “information concerning CGC’s internal executive compensation strategy, including how compensation is determined between and among executives.”
- “Stock ownership” covers “information concerning CGC stock, including ownership concentration and distribution, succession planning and criteria, details regarding the [Stock Restriction Agreement] and related documents, stock and dividend value, repurchases and the formula price.”
- “Financial performance” describes “information concerning CGC’s past and future financial performance, including financial statements, budgets, and forecasts.”

In addition to sealing its confidential material, CGC also asked the court to seal all other evidence that revealed or discussed the confidential material, such as expert witness reports, deposition transcripts, and trial testimony. And finally, CGC asked the court to exclude the public from the courtroom whenever trial proceedings, including witness testimony, involved CGC’s confidential material.

Learning of CGC’s motion to close the courtroom and seal the record, the Los Angeles Times asked for the court’s leave to appear to oppose CGC’s motion. The court granted the newspaper’s request. Following argument, the court granted CGC’s motion to seal its confidential materials.² The court relied on California Rule of Court, rule 243.1 (since renumbered with minor changes to rule 2.550). Subdivision (d) of that rule permits a court to seal a court record under the following limited conditions:

² The court did not reduce its ruling to writing until February 2006, three months after testimony ended. The court made clear, however, on the first day of trial after orally granting CGC’s motion, that the sealing order took immediate effect.

“The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.”

The court also ruled that it would bar the public from any trial proceedings or witness testimony involving CGC’s confidential materials.³ It directed counsel to anticipate before calling a witness whether the witness would be discussing CGC’s confidential materials. If the anticipated testimony involved such material, the court would decide whether to close the courtroom. Implementing its procedures, the court closed the parties’ opening statements and it appears from the record that the entire trial thereafter remained closed to the public. Nina appeals from the court’s order sealing the record and closing the proceedings.

DISCUSSION

1. *Sealing Order Did Not Comply With Court Rules*

A strong presumption exists in favor of public access to trials and court records. That presumption applies with equal vigor to divorce proceedings as to other ordinary civil matters. (*Burkle v. Burkle*, *supra*, 135 Cal.App.4th at p. 1052.) The public’s right to attend trials and review court records arises from the First Amendment’s constitutional guarantee of the public’s access to the courts, which extends to the evidence and testimony a court considers in discharging its constitutional obligation to uphold and apply the law. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th

³ The court relied on Family Code section 214 to close the courtroom. That statute allows a court to close family law proceedings “in the interests of justice and the persons involved.” In divorce proceedings, however, that statute must yield to the First Amendment. (*Burkle v. Burkle* (2006) 135 Cal.App.4th 1045, 1056.) In defending on appeal the court’s order closing the courtroom and sealing CGC records, CGC does not rely on section 214.

1178, 1209; *Burkle v. Burkle*, *supra*, at pp. 1052, 1054-1055.) Because First Amendment constitutional guarantees are at stake, trial courts must tread carefully, and may close courtrooms and seal court records only in limited circumstances. Our Supreme Court established in *NBC Subsidiary (KNBC-TV) v. Superior Court*, *supra*, that “before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must . . . expressly find” that excluding the public from the courtroom is the least restrictive way to avoid a “substantial probability” that an “overriding interest” will suffer prejudice from public disclosure. (*Id.* at pp. 1217-1218.)

California Rule of Court, rule 243.1, implements the standards of *NBC Subsidiary*. (See Advisory Com. com., West’s California Rules of Court, State (2004 ed.) foll. rule 243.1, p. 154.) To ensure against judicial missteps that might trample First Amendment rights, and to allow for adequate appellate review, a trial court’s sealing order must expressly state the facts that support the existence of the *NBC Subsidiary* elements. Rule 243.1, subdivision (e)(1) states: “An order sealing the record must (A) specifically state the facts that support the findings . . .” allowing the court to seal the record. The trial court made no such factual findings here. Instead, its sealing order recited in conclusory language the existence of the *NBC Subsidiary* elements with phrases that largely tracked those criteria. The sealing order stated:

“In determining that CGC has demonstrated a particularized need for closure of the trial concerning particular issues of fact, the Court made the following findings of fact pursuant to CRC 243.1 and 243.2: [¶] (a) There exist overriding interests in CGC Confidential Material that overcome the right of public access to this Confidential Material. [¶] (b) The overriding interests support closing the courtroom with respect to and sealing, CGC Confidential Material; [¶] (c) There exists a substantial probability that the overriding interests will be prejudiced if the courtroom is not closed and CGC Confidential Material is not sealed; [¶] (d) Closing portions of the trial that will reveal CGC Confidential Material, and sealing certain CGC Confidential Material used in connection with those portions of the trial, or otherwise offered in evidence, is narrowly tailored to achieve the purpose of protecting the overriding interests from the substantial probability that prejudice will result if closure and sealing are not ordered; [¶] (e) No less restrictive means exist to achieve and protect the overriding interests at issue here.”

The court's findings are not the same as *facts* supporting those findings. Reading rule 243.1 as one piece (and its current embodiment at rule 2.550 is in the same vein), the court must under subdivision (d) "expressly find[] facts that establish" satisfaction of the *NBC Subsidiary* elements, and under subdivision (e) entitled "Content and scope of the order" must "specifically state the facts that support the findings" of subdivision (d). The court may not frame its order in a way that satisfies only subdivision (d) and stop there. (See *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301-302 [sealing order must contain express findings of fact, unlike orders to unseal that may rest on implied findings of fact]; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group) ¶ 9:418.1, p. 9(I)-152 [notes sealing order must expressly state the facts that support the necessary *NBC Subsidiary* findings].)

The closest the trial court came to expressly identifying the facts supporting its finding that CGC had satisfied *NBC Subsidiary's* sealing criteria occurred when the court directed Tim's attorney to prepare an order setting forth those criteria. The court told counsel:

"I will need an order from counsel for petitioner to comply with at least in part with the NBC Subsidiary cases which talks about the necessary bases for that. And let me just tell you what I perceive [CGC] requested. In order to close the court, that case indicates that we must show that it's necessary to the interest of justice and the persons involved for that to occur. And the court must take into consideration the rules of proceedings in substance. And the court may only close the proceedings if there has been a demonstrative overriding interest supporting closure and substantial probability that the interest will be prejudiced absent closure. I have found that all of that is true by the declarations and documentations filed by Capital Group with their information, their proprietary information would be -- would cause some serious problems if that is revealed in open court."

The court's direction to counsel illustrates the very thing that subdivision (e)'s requirement of express factual findings would prevent: Our inability to adequately review the legal and factual basis of the court's sealing order because we cannot discern those bases beyond their rote recitation.

CGC does not dispute that the court failed to make express factual findings. Instead, it claims they can be culled from the record. It asserts the sealing order “incorporates by reference the analysis, evidence and reasoning” of CGC’s papers and evidence filed in support of its application for the order. CGC dismisses as needless “reiteration” the suggestion that the order must state the facts the court found to support its sealing order. But rule 243.1 establishes otherwise: Express findings are not reiteration; they are requirements.

While not conceding the sealing order’s inadequacy, CGC alternatively argues we may affirm the order if it is correct under any theory apparent from the record. The only authority CGC cites for its noncontroversial proposition that an appellate court ordinarily reviews the result a trial court reaches, not the trial court’s reasoning in arriving there, has nothing, however, to do with sealing orders. Instead, CGC cites *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, a case involving summary judgment of a claim for breach of implied warranty. We know of no court decision, and CGC cites none, that affirmed a sealing order without express factual findings showing satisfaction of the *NBC Subsidiary* elements.

Finally, CGC urges that if we conclude the current sealing order cannot stand, that we remand the matter to the trial court. Nina counters that CGC cannot satisfy *NBC Subsidiary’s* criteria, and thus she calls for an outright reversal of the order and unsealing of the court record and trial transcript. In support of her call, she cites *South Coast Newspapers, Inc. v. Superior Court* (2000) 85 Cal.App.4th 866 (*South Coast*) where the appellate court ordered the unsealing of a press photographer’s pictures without returning the matter to the trial court.

We decline so bold, and potentially irredeemably reckless, a remedy. On the record before us, CGC may have plausible arguments for preserving with a sealing order the confidentiality of some, or perhaps all, of the material it produced to Nina that the parties used at trial. (See e.g. *Burkle v. Burkle, supra*, 135 Cal.App.4th at p. 1063 [privacy of one’s finances can under the right circumstances be “compelling or overriding interest”].) In contrast, the *South Coast Newspapers, Inc.* decision that Nina cites for

outright unsealing involved a trial court’s prior restraint on publication of pictures of juvenile defendants charged as adults lawfully photographed outside the courtroom. (*South Coast, supra*, 85 Cal.App.4th at pp. 868-869.) The appellate court in *South Coast* did not remand the matter because its independent review established that the trial court’s order was an unconstitutional prior restraint. Here, in contrast, CGC argues that public disclosure of its compensation scheme and allocation of stock ownership among employees could harm the company morale that contributes to its success by encouraging “potentially demoralizing internal comparisons, competition, and questions about respective contributions and value to the organization.” It further argues that the information involves employee privacy, and could be a windfall to CGC’s competitors, who could exploit the information to hire away current employees and recruit new hires. And finally, CGC argues that disclosure of its financial history and performance would weaken its competitiveness by eliminating its “informational advantage in negotiating with other parties who lack this insight” about its financial results, revenues, operating margins, budgets, and projections. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 [ordinarily appropriate to seal financial and accounting data the disclosure of which would give advantage to competitors].)

We conclude the more prudent remedy for the trial court’s inadequate sealing order is to remand to the matter to trial court and return to counsel the documents filed under seal in this appeal.⁴ (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 110 [returned to party documents filed under seal with court of appeal that trial court had improperly sealed]; see also *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 889-890 [propriety of sealing in trial court is entirely separate question from propriety of sealing in appellate court because each court is “master of its own files”].) We find it appropriate that the trial court and parties, who best know what is at stake, do the hard work of

⁴ In the companion appeal involving the distribution of Tim and Nina’s marital property (*Armour v. Ritter* (B190301)), we will by separate order return to counsel the material filed under seal there.

expressly identifying the particular facts that support the existence of *NBC Subsidiary's* standards for sealing court records. It may be a time consuming row to hoe given the voluminous record from the 15 day trial, but the public's right of access guaranteed by the First Amendment demands no less.

2. *Sealing Order Not Unlawful Prior Restraint*

When it moved for a sealing order, CGC also asked the court to order Nina not to talk to the press about the court's closed proceedings. CGC urged: "Your honor, I think that Ms. Ritter should be instructed not to talk to the press about what happens in the closed courtroom about documents that have been sealed." In addition, CGC reiterated its view that the protective order Nina had signed continued to prohibit Nina's public disclosure of CGC's documents that were not used at trial. The court agreed to order Nina not to talk to others about the court's closed proceedings. But the court voiced its uncertainty about matters outside the courtroom. It told CGC, "We're going to do that, counsel [regarding sealed documents used in the courtroom]. That's not the issue. The issue is things that aren't in the closed courtroom. That's the issue as I understand it." After further argument, the court expanded its order to prohibit Nina from discussing with others any CGC material that she received through discovery. Beyond that, the court's order reached no farther and did not touch upon information she received from sources other than discovery or the court's closed proceedings. The court explained, "There can be no order with regard to information that she may have received prior to, from some other source. I think we can make the order that the information that she received in the confidential nature she cannot disclose that. But I think that's where we're stuck. I don't think we can go any further than that." The court thereafter reduced its oral ruling to writing, stating "The parties are prohibited from disclosing the contents of testimony, argument and CGC Confidential Material that has been sealed in any subsequently filed records or papers."

Nina contends the court's order was an unconstitutional prior restraint or "gag order." Except in the most unusual circumstances, such as troop movements during war,

a court may not prevent a person from speaking beforehand. (*Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1225; see also *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 661-662.) Rather, a person may instead speak, but, if in doing so violates a legal duty or obligation, must bear the consequences of having spoken. (Cal. Const., art. I, § 2, subd. (a) [person may speak freely but is “responsible for the abuse of this right”].) Nina characterizes the court’s order as follows: “CGC and Tim convinced the court to bar Nina from discussing her divorce trial or information included in documents produced by CGC during discovery based solely on CGC’s alleged right to maintain the privacy of information it deemed ‘confidential.’ ” She notes that the law prohibits almost all prior restraints on speech aimed to protect another’s privacy, which she contends is the court order’s effect here. (*Maggi*, at p. 1225; *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1244.)

Nina’s contention misapprehends the order. California Rules of Court permit a court to order parties not to reveal the contents of sealed materials. (See rule 2.551, subd. (e)(4); see also former rule, 243.2, subd. (e)(4).) By its terms, the court’s order applies only to matters sealed by the court, and thereby gives effect to the sealing order. We do not understand Nina objecting in principle to a lawful order not to discuss appropriately sealed documents or proceedings, for without a ban on discussing the substance of sealed matters, a sealing order would serve little purpose. (See *Marin Independent Journal v. Municipal Court* (1993) 12 Cal.App.4th 1712, 1718-1719 [to enforce lawful rule against photographing courtroom proceedings, court may seize camera film containing photographs taken unlawfully inside courtroom].) Rather, we understand her objection being the purported unlawfulness of the sealing order here, meaning her “gag order” contention rises or falls on the sealing order’s legality.⁵ In contrast, a prior restraint

⁵ Nina writes in her opening brief: “The trial court erred in sealing documents used at trial and in closing the courtroom to the public. Because that was the basis for gagging Nina – on an open-ended basis – from discussing the particulars of her own divorce, including information divulged in trial testimony and documents admitted at trial, the gag order must be vacated.”

squelches a lawful right speak; if no First Amendment right to speak exists as to a certain matter, then prohibiting that speech is not a prior restraint. (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1156; *DVD Copy Control Ass’n v. Bunner* (2003) 31 Cal.4th 864, 877-879, 886.) A mutually agreed to protective order of the sort Nina entered here during discovery for documents the parties do not use at trial does not infringe the First Amendment. (*Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 670-671.) Likewise, a lawfully issued sealing order by its issuance has resolved against a potential speaker any presumed First Amendment right to discuss the contents of the sealed material. (Accord *Marin Independent Journal v. Municipal Court*, *supra*, at pp. 1718-1719.) In the absence of a First Amendment right to discuss the substance of the sealed materials, the court’s order not to disclose their contents is not a prior restraint.

DISPOSITION

The sealing order is vacated and all materials filed in this appeal under seal with the clerk of this court is returned to the parties who filed them. The matter is remanded to the trial court to permit Intervenor-Respondent Capital Group Companies 60 days to reapply for an order sealing (1) the trial materials it designates as its confidential materials and (2) those portions of the trial transcript when witnesses testified about the contents of those materials. If Capital Group Companies does not file an application for a sealing order within 60 days after this opinion becomes final, the trial court shall unseal the entire trial transcript and all CGC materials used at trial.

Appellant Nina Ritter is to recover her costs on appeal.

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COOPER, P.J.

WE CONCUR:

FLIER, J.

BIGELOW, J.